

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

The Department of Transportation of the State of Illinois,
for and in behalf of the People of the State of Illinois,

Petitioner,

vs.

BNSF Railway Company, f/k/a Burlington Northern
Santa Fe Railway Company,

Respondent.

Petition for approval of the taking or damaging of certain
properties in McDonough County, Illinois by exercising
the right of eminent domain. Parcel No. 409U226TE

T05-0045

Petition for approval of the taking or damaging of certain
properties in McDonough County, Illinois by exercising
the right of eminent domain. Parcel Nos. 409U018PE
and 409U018TE.

T05-0046

Petition for approval of the taking or damaging of certain
properties in McDonough County, Illinois by exercising
the right of eminent domain. Parcel No. 409U026PE

T05-0047

Consolidated

ORDER

By the Commission:

On August 15, 2005, the Department of Transportation of the State of Illinois ("Petitioner") filed Petitions with the Illinois Commerce Commission ("Commission") naming as Respondent BNSF Railway Company, f/k/a Burlington Northern & Santa Fe Railway Company ("Respondent"), to approve the taking of certain property in McDonough County, Illinois, by exercising the power of eminent domain with respect to Parcel Nos. 409U226TE, 409U018PE, 409U018TE and 409U026PE. The Petitions were assigned Docket Nos. T05-0045, T05-0046 and T05-0047.

On August 24, 2005, Petitioner filed a Motion for Leave to file an Amended Petition for Approval to Take Property in each docket.

On October 3, 2005, Respondent filed an Answer and Affirmative Defense; on October 20, 2005, Petitioner filed, in each docket, a Motion to Strike Respondent's Affirmative Defense. On November 7, 2005, Respondent filed its Response to Petitioner's Motion to Strike Respondent's Affirmative Defense and Petitioner filed a Reply to that Response on November 11, 2005.

Pursuant to notice as required by law and by the rules and regulations of the Commission, a hearing was held in these dockets on November 20, 2005, before a duly authorized Administrative Law Judge of the Commission at the Commission's offices in Springfield, Illinois. Appearances were entered on behalf of Petitioner, Respondent and by a Staff member of the Railroad Section of the Transportation Division of the Commission ("Staff"). Petitioner's Motion for Leave to Amend, in each docket, was granted without objection. Petitioner's motion to consolidate Dockets T05-0045, T05-0046 and T05-0047 was also granted without objection.

Mr. Joseph Baumann, Condemnation Engineer employed by District 4 of the Illinois Department of Transportation, testified that Petitioner seeks a temporary easement to the property identified as Parcel No. 409U226TE, consisting of two tracts, a permanent easement to the property identified as Parcel No. 409U026PE, a permanent easement to the property identified as Parcel No. 409U018PE and a temporary easement to the property identified as Parcel No. 409U018TE. Mr. Baumann testified that each parcel is needed for a construction project which is a new alignment, a four-lane divided highway with access control that begins just west of Macomb, Illinois, at the intersection with U.S. Route 136, extending southerly and westerly and will eventually connect Macomb to Quincy, Illinois. The proposed FAP Route 315 alignment is for the purpose of assisting the motoring public by eliminating a number of intersections and usage of a divided highway which is a much safer surface for traveling than is usage of side-by-side lanes.

The parcels which are the subject of this proceeding are part of the total project and are located in an approximate 8.13 mile section extending from a proposed interchange southwest of Macomb to a point about a mile west of Tennessee, Illinois.

Mr. Baumann testified that Parcel Nos. 409U018PE and 409U018TE shown on Petitioner's Exhibit No. 5, are located approximately a mile west of Tennessee, Illinois.

The proposed realignment of U.S. 136 crosses Respondent's right of way and a permanent easement is sought at that point to permit construction of two side-by-side highway bridges over Respondent's tracks which will remain at existing grade. U.S. 136 is currently located to the northeast of Parcel No. 409U018PE and is there generally parallel with the Respondent's right of way. Parcel No. 409U018TE is located at a point where the proposed U.S. 136 diverges from the Respondent's right of way, goes west and then reconnects with the proposed new four-lane pavement directly west of Parcel No. 409U018PE. Parcel No. 409U018TE is sought for a period of three years from the date of possession, for primarily purposes of grading and shaping a ditch area between relocated U.S. 136 and the existing railroad tracks. Mr. Baumann further testified that Parcel No. 409U018PE is also needed for future maintenance and any future renewal of the structures to be built.

Mr. Baumann also testified that Parcel Nos. 409U018PE and 409U018TE are subjects of a June 16, 2006 letting schedule but in order for the project to go to letting, the Petitioner needs title to the parcels prior to the advertising of the project for bids as of May 10, 2006. Mr. Baumann additionally testified the construction of the structures at Parcel No. 409U018PE is to be carried out in a manner to permit the Respondent to continue its current operations without interruption. Mr. Baumann testified that the construction contemplated and for which Parcel Nos. 409U018PE and 409U018TE are necessary are part of a five-year plan of proposed highway improvements as depicted in Petitioner's Exhibit No. 14. The construction of which this permanent and temporary easement are sought is programmed as an FY2007 project on a June, 2006 letting.

Mr. Baumann testified that Parcel Nos. 409U226TE and 409U026PE are contained within Petitioner's Exhibit Nos. 3 and 4. Exhibit No. 3 depicts an interchange area immediately south of U.S. Highway 136. The ramps and main line construction of Illinois 336, which generally is a future by-pass around Macomb, Illinois, cross Respondent's existing tracks. The project contemplates construction of three structures under the railroad tracks which will remain at existing grade and are shown on Petitioner's Exhibit No. 4. The structures are identified as Ramp I, which will carry vehicular traffic southerly from Route 136 to 336; Ramp J, which will carry traffic from Route 336 northerly to 136; and, lastly, a two-span structure, located between Ramps I and J, which will allow the four-lane divided highway, U.S. 336, to pass under the railroad tracks. Mr. Baumann testified construction of a shoo-fly, a temporary relocation of the Respondent's rails, is necessary to permit construction of those three structures. Upon completion of construction of the structures, usage of the shoo-fly will terminate

and usage of the main track will resume without delay other than removal of the shoo-fly tie-in.

Mr. Baumann further testified that Parcel No. 409U226TE, tracts 1 and 2, is a temporary easement needed for construction of the shoo-fly and for contractor access.

Mr. Baumann further testified that Parcel Nos. 409U226TE and 409U026PE are on a January, 2006 letting schedule and, assuming that construction of the shoo-fly begins in early 2006, construction should be completed not later than June, 2008. Construction of the shoo-fly will be made by the Petitioner's contractor although shoo-fly tie-ins will be made by the Respondent or by the Respondent's contractor. The specifications for the shoo-fly construction requires the Petitioner's contractor to meet the requirements of the Respondent. Mr. Baumann stated that the only impact of the shoo-fly construction upon the daily operation of the Respondent will be the delays that occur when the actual tie-in of the ends of shoo-fly track to the existing tracks. The Respondent will otherwise be able to continue its existing daily operations throughout the construction of the shoo-fly and of the three structures.

Mr. Baumann testified that funds for the construction of which Parcel Nos. 409U226TE and 409U026PE are required have been appropriated for fiscal year 2006. Mr. Baumann also testified that Petitioner has been unable to acquire the parcels of these consolidated dockets by negotiation and that the projects of which these parcels are part cannot be completed in the absence of acquisition.

Mr. Baumann further testified that all construction taking place, including the grading, the shaping, the ditches, and other associated matters, will be in compliance with the vertical and horizontal clearances under 92 Ill. Adm. Code Part 1500.

On cross-examination, Mr. Baumann testified that there is no agreement at this time by and between Petitioner and Respondent for the construction of, connection to, or operation over the shoo-fly by Respondent. Mr. Baumann further testified that construction of the three underpasses as proposed by Petitioner are designed currently for just one track and that the Respondent's future use of its right of way, other than as a single track, would necessitate the construction of subway structures. There was no evidence of Respondent's intended future use of its right of way.

Mr. Baumann also testified that in addition to acquiring parcels owned by the

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Respondent for the overpass structures, IDOT is in the process of acquiring other parcels necessary for construction of those two overpasses. It is necessary for IDOT to acquire those additional parcels before the planned June construction letting. There are, as a part of that June letting, 47 parcels needed, including parcels owned by the railroad; 23 of those parcels have been acquired, three are currently in the process of condemnation and IDOT is attempting to acquire the remaining 21 parcels and expects to have those acquisitions completed by May.

Thomas Lacy, a Project Engineer employed by Petitioner's District 4, testified that Petitioner's construction plans, which provide for construction of a shoo-fly, provide sufficient land for the Respondent to conduct operations during construction within its right of way. Mr. Lacy testified that Petitioner had coordinated with Respondent as far as geometrics on the shoo-fly and had obtained approval for those geometrics based on a 79 mile per hour design speed but the Petitioner and Respondent had not yet reached agreement on work responsibilities.

The Commission has reviewed the briefs filed by Petitioner and Respondent on Respondent's Affirmative Defenses and the evidence adduced at the November 2, 2005 hearing. The Commission notes that Respondent posits that Illinois laws of eminent domain are preempted in every instance in which the State of Illinois, or one of its departments, attempts to acquire property owned by a railroad through eminent domain. Respondent cites several cases in support of its position but only one of those involves condemnation and the cases provided are distinguishable from the facts in these dockets. Further, the facts in Wisconsin Central, Limited v. City of Marshfield, 160 F.Supp.2d 1009 (USDC W.D. Wis. 2000), were that the condemnation sought by the City of Marshfield would have necessitated the removal of more than 6,800 feet of track which was required for the railroad's operation of its single track line and that taking, if permitted, would have prevented part of the operations of the railroad. Respondent further cites City of Riverview v. Surface Transportation Board, 398 F.3d 434 (6th Cir. 2005), in which the Court states that state and local governments may not condemn railroad property under the regulatory jurisdiction of the Surface Transportation Board but the Court provides no support for its statement. Respondent relies on the decision of the Surface Transportation Board in Maumee and Western Railroad Corporation and RMW Ventures, LLC, Finance Docket No. 34-354, decided March, 2004, which held that federal preemption would not result unless the taking of property under State eminent domain laws would prevent or unreasonably interfere with the railroad's operations. The Surface Transportation Board is "uniquely qualified to determine whether state law ...

should be preempted.” CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F.Supp.1573 (USDC, N.D. Ga. Atlanta Div. 1996), citing Medtronic v. Lohr, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). The evidence in this case is that the operation of Respondent’s business will be delayed only when the ends of the shoo-fly track are tied into and later removed from the Respondent’s main track; there is no evidence that Respondent’s business operations will be impeded following removal of the shoo-fly. The Commission does not believe that the delay caused by the tie-in and removal of the shoo-fly will prevent or unreasonably interfere with Respondent’s operations and that the facts in these dockets are similar to the facts in Maumee v. Western Railroad Corporation and RMW Ventures, LLC, *supra*.

A proposed order was served on the parties on February 16, 2006. Briefs on Exceptions were filed on behalf of Petitioner, Respondent and Staff. Said Briefs have been considered in reaching the ultimate conclusions of this order.

The Commission, after review of the entire record, finds that:

- (1) the Commission has jurisdiction of the subject matter hereof and the parties hereto;
- (2) the recitals set forth in the prefatory portion of this Order are supported by the evidence of record and are hereby adopted as findings of fact;
- (3) Petitioner’s Motion to Strike Respondent’s Affirmative Defense should be denied;
- (4) Petitioner seeks to acquire a temporary easement for a period of three years from the date Petitioner obtains possession of said property or until completion of construction, whichever is earlier, in Parcel No. 409U226TE, consisting of two tracts, and Parcel No. 409U018TE, legally described in Appendices “A” and “B”, respectively, attached hereto, presently owned of record by Respondent;
- (5) Petitioner seeks to acquire a permanent easement in Parcel No. 409U018PE and Parcel No. 409U026PE, legally described in Appendices “C” and “D”, respectively, attached hereto, presently owned of record by Respondent;

- (6) Petitioner seeks to acquire the property interest described above to better serve the traveling public and to increase public safety in McDonough County;
- (7) Petitioner presented evidence of the ownership by Respondent of the subject property;
- (8) the evidence shows that the proposed construction can be carried out without interfering with Respondent's rail carrier operations;
- (9) the desired property interests are reasonably necessary for the proposed project and the Petitions should be granted.

IT IS, THEREFORE, ORDERED that the approval of the Commission be, and it is hereby, granted to the Department of Transportation of the State of Illinois, for the purpose of exercising its power of eminent domain for the purpose of acquiring temporary easements to Parcel No. 409U226TE, consisting of two tracts, and Parcel No. 409U018TE, legally described in Appendices "A" and "B", respectively, attached hereto, and, further, that said temporary easements shall be for a period of three years from the date Petitioner takes possession of said property or until the completion of construction, whichever is earlier.

IT IS FURTHER ORDERED that the approval of the Commission be, and it is hereby, granted to the Department of Transportation of the State of Illinois, for the purpose of exercising its power of eminent domain for the purpose of acquiring a permanent easement to Parcel No. 409U018PE and Parcel No. 409U026PE, legally described in Appendices "C" and "D", respectively, attached hereto.

IT IS FURTHER ORDERED that Petitioner's Motion to Strike Respondent's Affirmative Defenses is denied.

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IT IS FURTHER ORDERED that subject to Sections 18c-2201 and 18c-2206 of the law, this is a final decision, subject to the Administrative Review Law.

By order of the Commission this 19th day of April, 2006.

Charles E. Boff

Chairman

JUDGE	<i>[Signature]</i>
SECTION CHIEF	
ORDERS SUPERVISOR	<i>[Signature]</i>

APPENDIX A

TRACT ONE

A part of the Southeast Quarter of Section 4, Township 5 North, Range 3 West of the Fourth Principal Meridian, McDonough County, Illinois, described as follows:

Beginning at a point on the southerly right-of-way line of Burlington Northern & Santa Fe Railroad, said point being 601.68 feet radially distance westerly from the proposed centerline of FAP Route 315 at station 551+90.07; thence southwesterly along said southerly right-of-way line, 1,857.00 feet to a point being 2,347.56 feet normally distance westerly from said centerline station 545+29.06; thence northwesterly to the northerly right-of-way line of said Railroad, said point being 2,382.11 feet normally distance westerly from said centerline station 546+22.81; thence northeasterly along said northerly right-of-way line, 1,857.00 feet to a point being 632.68 feet radially distance westerly from said centerline station 552+93.49; thence 100.00 feet to the Point of Beginning, containing 185,700 square feet, or 4.263 acres, more or less.

TRACT TWO

A part of the Southeast Quarter of Section 4, Township 5 North, Range 3 West of the Fourth Principal Meridian, McDonough County, Illinois, described as follows:

Beginning at a point on the northerly right-of-way line of Burlington Northern & Santa Fe Railroad, said point being 467.70 feet radially distance easterly from the proposed centerline of FAP Route 315 at station 556+21.66; thence northeasterly along said northerly right-of-way line, 1,687.00 feet to a point being 2,105.70 feet radially distance easterly from said centerline station 559+68.64; thence southeasterly to the southerly right-of-way line of said Railroad, said point being 2,128.02 feet radially distance easterly from said centerline station 558+92.30; thence southwesterly along said southerly right-of-way line, 1,687.00 feet to a point being 494.50 feet radially distance easterly from said centerline station 555+31.02; thence northerly 100.00 feet to the Point of Beginning, containing 168,700 square feet, or 3.873 acres, more or less.

The said Tracts One and Two contain 354,400 square feet, more or less, or 8.136 acres, more or less.

The said Real Estate being also shown by the plat hereto attached and made a part hereof.

409U226TER1

APPENDIX B

A part of Lots 3, 4 and 6 in the Northwest Quarter of Section 22, Township 5 North, Range 4 West of the Fourth Principal Meridian, McDonough County, Illinois, described as follows:

Commencing at the Southwest Corner of the Northwest Quarter of said Section 22; thence North 0 degrees 46 minutes 19 seconds East, 305.28 feet to the Northwestern Right-of-Way line of the Burlington Northern and Santa Fe Railroad; thence North 57 degrees 37 minutes 34 seconds East along said Northwestern Right-of-Way Line, 624.59 feet to the Point of Beginning, said point being 135.82 feet normally distant Southerly from the proposed Centerline of Relocated IL Route 136 at Station 25+47.10; thence North 57 degrees 37 minutes 34 seconds East along the northerly right-of-way line of said Burlington and Northern Railroad, 888.26 feet to a point being 60.95 feet normally distant Southerly from said Centerline Station 33+99.01; thence South 32 degrees 22 minutes 30 seconds East, 10.00 feet to a point being 70.95 feet normally distant Southerly from said Centerline Station 33+98.86; thence South 57 degrees 37 minutes 34 seconds West, 888.26 feet to a point being 145.29 feet normally distant Southerly from said Centerline Station 25+50.00; thence North 32 degrees 22 minutes 31 seconds West, 10.00 feet to the Point of Beginning, containing 8,883 square feet, or 0.204 acre, more or less.

It is not the intent of this instrument to encumber any building or structure lying within this easement area.

The said Real Estate being also shown by the plat hereto attached and made a part hereof.

409U018TER1

APPENDIX C

A part of the Northeast Quarter and Southeast Quarter of Section 21, Township 5 North, Range 4 West of the Fourth Principal Meridian, McDonough County, Illinois, described as follows:

Commencing at the southeast corner of the Northeast Quarter of said Section 21; thence North 0 degrees 46 minutes 19 seconds East along the east line of said Northeast Quarter, 185.84 feet to the southeasterly right-of-way line of the Burlington Northern and Santa Fe Railroad, being the Point of Beginning, said point also being 85.61 normally distant northerly from the proposed centerline of FAP Route 315; thence South 57 degrees 37 minutes 34 seconds West along said southeasterly right-of-way line, 658.73 feet to a point being 285.58 feet normally distant southerly from said centerline; thence North 32 degrees 23 minutes 28 seconds West, 100.00 feet to the said northwesterly right-of-way line of said Burlington Northern and Santa Fe Railroad, said point being 202.98 feet normally distant southerly from said centerline; thence North 57 degrees 37 minutes 34 seconds East on said northwesterly right-of-way line, 724.85 feet to a point being 205.46 feet normally distant northerly from said centerline; thence South 74 degrees 21 minutes 33 seconds East, 134.53 feet to said southeasterly right-of-way line, said point being 173.56 feet normally distant northerly from said Centerline; thence South 57 degrees 37 minutes 34 seconds West along said southeasterly right-of-way line, 156.08 feet to the Point of Beginning, containing 76,984 square feet, or 1.767 acres, more or less.

409U018PER1

APPENDIX D

A part of the Southeast Quarter of Section 4, Township 5 North, Range 3 West of the Fourth Principal Meridian, McDonough County, Illinois, described as follows:

Commencing at the southeast corner of the Southeast Quarter of said Section 4; thence North 0 degrees 46 minutes 59 seconds East along the east line of the said Southeast Quarter, 1,355.92 feet to the southerly right-of-way line of the Burlington Northern and Santa Fe Railroad; thence South 72 degrees 32 minutes 14 seconds West along said southerly right-of-way line, 585.39 feet to the Point of Beginning, said point being 494.50 feet normally distant easterly from the proposed centerline of FAP Route 315; thence South 72 degrees 32 minutes 14 seconds West along said southerly right-of-way line, 1,147.01 feet to a point being 601.68 feet normally distant westerly from said centerline; thence North 17 degrees 27 minutes 46 seconds West, 100.00 feet to the northerly right-of-way line of said Burlington Northern and Santa Fe Railroad, said point being 632.68 feet normally distant westerly from said centerline; thence North 72 degrees 32 minutes 14 seconds East along said northerly right-of-way line, 1,147.01 feet to a point being 467.70 feet normally distant easterly from said centerline; thence South 17 degrees 27 minutes 46 seconds East, 100.00 feet to the Point of Beginning, containing 114,701 square feet, or 2.633 acres, more or less.

409U026PER1